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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	92059016
Party	Defendant Radius Track Corporation
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Submission	Motion to Dismiss 2.132
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Date	05/18/2015
Attachments	Registrant's Motion for Involuntary Dismissal for Failure to Prosecute.pdf(175314 bytes )

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

In the matter of U.S. Trademark Registration No. 2,215,593  
For the mark: RADIUS TRACK  
Date registered on Supplemental Register: December 29, 1998

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DURAFRAME, LLC,

Petitioner,

Cancellation No.: 92059016

v.

RADIUS TRACK CORPORATION,

Registrant.

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**REGISTRANT'S MOTION FOR INVOLUNTARY  
DISMISSAL FOR FAILURE TO PROSECUTE UNDER 37 CFR §2.132**

Registrant, Radius Track Corporation (hereinafter "Radius Track" or "Registrant"), hereby moves this Board for an Order dismissing the above-captioned Cancellation Proceeding based upon Petitioner, Duraframe, LLC's failure to prosecute by failing to take testimony or offer any other evidence. The basis for this Motion is set forth below in the Memorandum of Law submitted in conjunction with this Motion.

**I. MEMORANDUM OF LAW**

**A. Introduction**

The instant cancellation proceeding was instituted by Petitioner on April 9, 2014 seeking to cancel Registrant's registered trademark RADIUS TRACK, U.S. Reg. No. 2,215,593 (hereinafter the "Registration"). The RADIUS TRACK mark registered on the Supplemental Register on March 13, 1998. The Registration properly asserts a date of first use in commerce of

January 15, 1997. Since that time, Registrant has continuously used the registered mark RADIUS TRACK in connection with its metal framing member products.

Duraframe filed its Petition to Cancel the Registration in response to Registrant's notification requesting the cessation of Duraframe's improper use of the RADIUS TRACK mark in association with products that are competitive with those sold by Registrant under its RADIUS TRACK mark.

On April 10, 2014 this Board issued a Scheduling Order that required Registrant to submit a response to the Petition for Cancellation by May 20, 2014. On May 20<sup>th</sup>, Registrant filed its response to the Petition. On that same date Registrant, pursuant to 37 CFR §2.116(a) and Federal Rule of Civil Procedure 12(b)(6), filed a Motion to Dismiss two of the three counts alleged in the Petition. Petitioner, apparently (and correctly) recognizing that it could not successfully cancel the Registration under the two counts at issue in Registrant's Motion to Dismiss, ignored the motion completely. On July 31, 2014 this Board held that Registrant's motion "is granted as conceded" and dismissed with prejudice the two counts at issue in the motion.

On August 1, 2014 this Board issued a revised Scheduling Order. Per this Order, Petitioner's 30-day trial period ended on April 28<sup>th</sup>. Petitioner failed to take testimony, and did not offer any other evidence during (or after) its trial period. In other words, Petitioner "has not taken testimony or offered any other evidence" within the meaning of 37 CFR §2.132(a).

## **B. Discussion**

A registrant in a cancellation proceeding may appropriately file a motion for judgment directed to the sufficiency of a petitioner's trial evidence when the petitioner's testimony period has passed, and the petitioner has not taken testimony or offered any other evidence. See TBMP

§ 534.02. In such a situation, the registrant may, without waiving its right to offer evidence in the event the motion is denied, move for dismissal for failure of the petitioner to prosecute. See TBMP § 534.02; Hewlett-Packard Company v. Olympus Corp., 18 U.S.P.Q. 2<sup>nd</sup> 1710, 1712 (Fed. Cir. 1991); Procyon Pharmaceuticals, Inc. v. Procyon Biopharma, Inc., 61 U.S.P.Q. 2<sup>nd</sup> 1542, 1544 (TTAB 2001). The purpose of a motion to dismiss under 37 CFR § 2.132(a) is to save the registrant the expense and delay of continuing with the trial in those cases where petitioner has failed to offer any evidence during its testimony period. Otter Products, LLC v. Base One Labs, LLC, 105 U.S.P.Q. 2<sup>nd</sup> 1252, 1254 (TTAB 2012).

37 CFR §2.132(a) states, in relevant part, as follows:

If the time for taking testimony by any party in the position of plaintiff has expired and that party has not taken testimony or offered any other evidence, any party in the position of defendant may, without waiving the right to offer evidence in the event the motion is denied, move for dismissal on the ground of the failure of the plaintiff to prosecute. . . . In the absence of a showing of good and sufficient cause, judgment may be rendered against the party in the position of plaintiff.

In this case, the revised Scheduling Order setting a deadline of April 28, 2015 for Petitioner to take testimony or any other evidence to support its claim passed without the taking of any testimonial or the offering of any other evidence through a notice of reliance or otherwise. Petitioner, apparently recognizing the core weakness of its position in this matter, has therefore completely failed to prosecute its supposed “claim” within the parameters of this Board’s revised Scheduling Order dated August 1, 2014. Pursuant to 37 CFR § 2.132(a), such failure to prosecute dictates that the instant Opposition Proceeding must be dismissed, and judgment must be rendered in Registrant’s favor.

## **II. CONCLUSION**

For all the above-stated reasons, it is respectfully requested that the instant proceeding be dismissed with prejudice, and that judgment be rendered on all Counts in Registrant's favor.

Respectfully submitted,

Date: May 18, 2015

A handwritten signature in black ink, appearing to read 'Mark J. Burns', is written over a horizontal line.

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**CERTIFICATE OF SERVICE**

I hereby certify that a true copy of the foregoing MOTION FOR INVOLUNTARY DISMISSAL FOR FAILURE TO PROSECUTE UNDER 37 CFR §2.132 was served on Woods, Oviatt, Gilman, LLP, c/o Katherine H. McGuire, 2 State Street, 700 Crossroads Building, Rochester, NY 14614, Attorney for Petitioner, via email ([KMcGuire@woodsoviatt.com](mailto:KMcGuire@woodsoviatt.com)), and U.S. Mail, postage pre-paid on May 18, 2015.

Respectfully submitted,

Date: May 18, 2015



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